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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re N.G., a Person Coming Under the
Juvenile Court Law.

B216082
(Los Angeles County
Super. Ct. No. CK59646)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

P.R.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County.

Marguerite D. Downing, Judge. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

* * * * *

Mother, P.R., appeals from the orders and findings of the juvenile court assuming jurisdiction over her infant daughter, N.G., and removing the child from mother's custody. Mother asserts there is insufficient evidence to support the orders and findings, despite her eight-year history of drug abuse, loss of custody of four older children due to her drug abuse, her methamphetamine use and criminal activity during her pregnancy with the infant, and her failure to test regularly for drugs for the four months leading up to the court's removal order. Mother contends the child was taken into custody at birth after mother tested positive for benzodiazepine, but, as it later became clear, the test was a false positive result due to pain medication the doctors at the hospital gave mother when she was in labor. Mother maintains the court improperly found jurisdiction entirely on the basis of her past history and there was no substantial evidence of any need to keep the infant from mother's custody as of the date of the disposition hearing. We affirm.

FACTS AND PROCEDURAL HISTORY

In January 2009, respondent Los Angeles County Department of Children and Family Services (Department) filed a petition on the newborn infant's behalf under Welfare and Institutions Code section 300, subdivisions (b) and (j),¹ alleging that mother had an eight-year history of substance abuse including amphetamine, was a current user of methamphetamine and benzodiazepine, and had a positive screen for benzodiazepine at N.G.'s birth. The petition further alleged that father² failed to take action and N.G.'s older siblings were prior dependents of the juvenile court due to mother's drug use.

Mother had an eight-year history of substance abuse. One of the minor's older siblings was born positive for methamphetamine in 2005, and mother received voluntary services at that time. When mother failed to comply with the plan, the Department initiated dependency proceedings for the minor's four siblings. The juvenile court denied mother reunification services with those children when mother's whereabouts became unknown. The Department's records reflected that mother had no contact with the older

¹ All further statutory references are to the Welfare and Institutions Code.

² Father is not a party to this appeal.

children for the duration of their dependency case. The siblings' case terminated in 2007 with the juvenile court returning the siblings to father's sole legal and physical custody.

When N.G. was born in 2009, mother tested positive for benzodiazepine. Mother told the hospital social worker the positive test was due to pain killers she was given during labor and denied any current use of illegal drugs. However, she admitted to using methamphetamine once early in her pregnancy, which at the time she planned to terminate, and once in October 2008, about three months before the minor's birth. Mother stated she had not completed any drug treatment programs although she was aware of that requirement in the previous dependency proceeding involving her older children.

Father was present for N.G.'s birth and was willing to care for the child. Although he admitted to a history of methamphetamine use, he stated he had not used drugs in years despite never having completed a drug treatment program. He told the social worker he was given custody of his older children because he had complied with all of the Department's requirements in the prior case.³ Father denied knowledge of mother's current methamphetamine use, saying that she told him she had stopped and he believed her. Father said he had ended his relationship with mother because her drug use caused the older children's dependency.

Father had a long criminal history that dated back to a 1994 conviction of misdemeanor burglary. In 1995, he was convicted of misdemeanor vandalism. In 2000, he was arrested for driving under the influence, and a bench warrant was issued for him a year later. In 2005, he was arrested for taking a vehicle without the owner's consent. In 2006, he was detained for grand theft auto, arrested for theft and convicted of felony

³ By the time the present proceedings were initiated, father had surrendered responsibility for the minor's siblings to his mother in Mexico after being arrested on a drug charge. The older children were not taken into the Department's custody when the present proceedings were initiated as they were living in Mexico with their paternal grandmother. The paternal grandparents expressed a willingness to take the minor into their home to be with her siblings.

burglary. In 2007, he was convicted of taking a vehicle without the owner's consent, a felony.

In 2008, father was detained three times for drug use, and he was convicted of misdemeanor drug use and felony possession. The conviction for possession resulted in an order that father attend drug treatment, an order that father violated in June and August 2008. In September 2008, father was arrested again for drug use and was ordered to complete a six-month, inpatient program. Mother was arrested along with father in September 2008. She was later convicted of misdemeanor receipt of stolen property.

In December 2008, father failed to appear for his arraignment hearing, and a bench warrant was issued for his arrest.

The detention report the Department prepared for the juvenile court in January 2009 indicated the minor's toxicology screen had in fact been negative. The social worker left telephone messages asking mother's doctor to comment on the prior false positive drug test, but the worker had yet to receive a response by the date of her report.

At the detention hearing, the juvenile court found father to be the minor's presumed father. During the hearing, father's counsel informed the court father was residing in a drug treatment program through the criminal courts. Father was willing to leave the program if the minor were placed with him. Alternatively, father stated he would arrange for his aunt, with whom both parents resided, to care for the child. The court found a prima facie case for detention and set the matter for a jurisdiction and disposition hearing. The court ordered the minor released to father, granting him leave to make a plan for the minor to reside with the aunt until father was released from his inpatient program.

Within a month, the Department requested that the child be detained from father. Father was planning to reenter an inpatient treatment program and intended to leave the child with mother, his aunt or another relative. The aunt apparently was not available to care for the baby, and the other relative lived too far away to allow visitation. The Department investigated whether it would be appropriate to place the child with mother, but she was living with her stepmother, who refused to submit to a criminal background

check. Also, even though she had agreed to do so, mother had failed to enroll in parenting classes and a drug treatment program.

The jurisdiction and disposition report subsequently indicated the minor was healthy and was currently released to father's custody. Mother now denied telling anyone she had used methamphetamine during the pregnancy. She claimed she may have told the hospital staff she had taken medication in October 2008 and denied stating anything else. Mother initially did not plan to keep the baby and did not seek prenatal care until December 2008. She had only one prenatal visit, in early January 2009, a week before the baby's birth. Mother told the investigating social worker she had been sober since 2006 without receiving treatment. She claimed she hit "rock bottom" and left town. When further questioned, mother became evasive and would say only that she went to stay with a grandmother in Arkansas. The investigating social worker was unable to continue the interview because mother claimed she did not have enough minutes on her telephone and then failed to return the worker's subsequent calls.

Mother's doctor told the social worker mother was given Nubain, Phenergan, penicillin and Motrin at the time of the minor's birth. The doctor explained that Nubain and Phenergan could result in a false positive for benzodiazepine. The hospital social worker informed the investigating social worker a confirmation report had verified the negative test result on mother's drug screen. Mother had also submitted to an on-demand drug test with a negative result.

The jurisdiction and disposition report further described the September 2008 arrests of mother and father. Police officers stopped a car that mother was driving, in which father was a passenger. Both parents appeared to be under the influence of a controlled substance. Father told the officers he had used methamphetamines the day before. Mother denied ingesting any narcotic, telling the officers, "I don't do meth anymore." However, the officer performed field sobriety tests on mother and found her performance consistent with someone under the influence of a controlled substance.

Both mother and father were taken to the station.⁴ They were given the opportunity to take a urine test to show the presence or absence of methamphetamine in their system. Both declined, and mother stated, “Why bother[.] I already told you that I used[.] I know I’m going to p--- dirty.” Father was arrested for being under the influence of a controlled substance. The police found stolen industrial tools in the car, and mother was convicted of the misdemeanor offense of receiving stolen property. She was placed on three years’ probation.

At the time of the jurisdictional and dispositional report, mother was unemployed and demonstrated no change in life style. The Department recommended family reunification services for mother, but it opposed releasing the minor to mother until she could demonstrate an ability to remain sober from drugs and protect her child from drug exposure or drug abuse.

The social worker also interviewed father, who was not forthcoming. He denied any current drug use and stated he was not tested for drugs when he was arrested. Father’s probation officer advised the worker that father had been on probation since August 2008 for three convictions: burglary, possession of a controlled substance and being under the influence of a controlled substance. He would remain on probation until July 2011. Due to a directive, the probation officer could not disclose to the social worker whether father was following all his probation conditions or whether he had missed or failed any drug tests.

In February 2009, the Department filed an amended section 300 petition. The amended petition asserted additional claims under subdivisions (b) and (g), alleging father had a criminal history, including convictions for possession of a controlled substance and being under the influence of a controlled substance, and had a bench warrant outstanding. The Department also reported that mother had not enrolled in

⁴ A third occupant of the car, who also appeared to be under the influence, was found to be in possession of a white crystalline substance resembling methamphetamine and was arrested along with mother and father.

classes and programs to which the Department had referred her and father had stated he would be checking into an inpatient recovery program. Accordingly, the Department recommended that the minor be detained from her placement with father.

At a February 2009 pretrial resolution conference hearing, mother's counsel asked the juvenile court to release the child to mother, pointing out the child was detained at birth because of mother's purported positive test for benzodiazepine, which in fact turned out to be negative. Counsel informed the court father would move out of his aunt's house, so mother could move in and the child could continue to live in the home under mother's care. The court noted that mother never completed a substance abuse program; she admittedly used methamphetamine in October 2008 and did not obtain prenatal care until January 2009. The court therefore denied mother's request, "based upon mother's lack of responsibility and poor judgment with respect to this unborn child." The court instead ordered the minor to remain released to father and ordered the Department to allow father to make a plan for the minor prior to his enrollment in a drug treatment program.

In March 2009, the Department reported to the juvenile court that the parents had failed to drug test and father's aunt, whom father had named as his preferred caretaker in his absence, and the other adults in her home had not yet submitted to a live scan. Father also had not been able to enroll in his inpatient program, and the Department could not verify whether father had violated his conditions of probation or remained free from illicit drug use. In the meantime, the minor remained with father. Despite many efforts, the social worker was having difficulties in maintaining contact with the child as father had a pattern of making appointments and breaking them.

At the jurisdiction hearing in April 2009, the dependency investigator testified and confirmed mother tested negative for benzodiazepine at the time of the minor's birth. She stated that though mother admitted she had a prior history of drug use, mother had minimized the problem. The investigator learned on the date of the hearing that mother was enrolled in a drug program.

Mother and father requested that the petition be dismissed. The child's counsel asked the court not to dismiss the petition but to place the family under informal supervision to monitor their progress.

The juvenile court found true allegations that mother had a history of substance abuse and was a current user of methamphetamine and benzodiazepine. However, the court struck the reference to mother's positive drug test because "mother didn't have a positive toxicology test." The court also found true the allegation that father had a criminal history but struck the remaining counts against father.

The amended petition as sustained alleged: "[M]other . . . has an eight year history of substance abuse including amphetamine and is a current user of methamphetamine, which renders . . . mother incapable of providing regular care for the child. . . . [M]other used methamphetamine . . . during her pregnancy with the child. The child's siblings . . . were prior dependents of the Juvenile Court due to . . . mother's substance abuse. . . . [M]other's substance abuse endangers the child's physical and emotional health and safety and creates a detrimental home environment, placing the child at risk of physical and emotional harm and damage."

As to father, the sustained amended petition alleged he "has a recent criminal history of arrests and convictions that includes possession of a controlled substance and . . . under the influence of a controlled substance. On [August 1, 2008], father was placed on probation and to date has failed to comply with conditions to enroll in an in-patient substance abuse program. On [December 3, 2008], a bench warrant was issued for father in the amount of \$50,000 for failing to appear for arraignment. Such criminal history endangers the child's physical and emotional health and safety and places the child at risk of serious physical harm and emotional damage."

The juvenile court indicated that had the parents complied with the court's order to drug test, it would have granted the request for an informal supervision order. However, the court stated it had ordered mother to test "forthwith" in January 2009 and "[t]hat hasn't happened." Mother had tested only once. The court also had allowed father to make an "appropriate plan" for the infant before entering his drug treatment program.

The Department made repeated requests for the adults living in the home to live scan, but “[t]hat hasn’t happened.” In addition, father was to have tested and failed to do so a number of times. Such failures, the court said, were “indications to this court that informal probation or informal supervision [would not] work.”

The juvenile court found that mother had a drug history and had used in the last six- to nine-month period. Coupled with mother’s denials, that mother’s single test was for alcohol rather than drugs triggered the court’s concern that mother might be trying to prevent a positive test. The court observed that father had failed to test on repeated occasions. He had repeated issues with drugs, including an August 2008 “under the influence” arrest and more than one drug conviction. He was on probation for drugs and had a warrant outstanding. Moreover, father had failed to make an appropriate plan to care for the minor. The juvenile court therefore ordered the minor removed from father, continued the matter for disposition and ordered the parents present for the next hearing without further notice.

After the adjudication, the Department was unable to locate the parents and the child to place her in protective custody. A few days later, father got in touch with the social worker and explained he had been unaware the Department was trying to locate him. The Department reported that four warrants were issued for father’s arrest in December 2008.

The juvenile court again made formal detention findings, ordering the child detained from father’s custody. The minor was removed and placed in a foster home.

An interim review report advised the juvenile court that mother had enrolled in an outpatient drug program in March 2009. A letter from her counselor stated she had one counseling session, during which mother appeared depressed and to lack motivation. Mother was scheduled to meet with her counselor weekly, but she did not attend for two weeks in April. Mother failed to show for two additional drug tests and did not request any visits with the minor.

At the disposition hearing in May 2009, mother’s counsel moved for an order placing the minor with mother. She stated that mother was currently drug testing through

her substance abuse program. The juvenile court denied mother's motion. The court found mother had only participated in her program for a month, and the minor was the fifth child to be detained, the original petition being filed in June 2005. The court found the problem had been longstanding, and it had received no results from on-demand testing.

The juvenile court therefore declared the minor a dependent. The court ordered reunification services for both parents, with such services to include parent education, drug rehabilitation with random testing and individual counseling. Both parents were ordered to comply with the terms of their probation. Mother was also ordered to participate in an after-care program such as NA or AA (Narcotics Anonymous or Alcoholics Anonymous).

Mother timely appealed from the jurisdiction and disposition orders.

DISCUSSION

1. Substantial Evidence Supports Jurisdiction

On appeal, jurisdictional findings are reviewed for substantial evidence. (*In re James C.* (2002) 104 Cal.App.4th 470, 482 (*James C.*)) Under this standard, we examine the entire record in the light most favorable to the findings and conclusions of the juvenile court, and we defer to that court on issues of credibility of the evidence and witnesses. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.) The parent has the burden of showing the juvenile court's finding or order is not supported by substantial evidence. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) We must affirm the exercise of jurisdiction under any theory supported by the record. (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875-877.)

Mother contends no substantial evidence supports jurisdiction under section 300, subdivision (b), asserting that with the court's striking allegations regarding the alleged positive toxicology screen, the sustained count of the amended petition with respect to

mother is “little more than an allegation of historical facts.” We conclude substantial evidence supports the juvenile court’s jurisdictional findings.⁵

Section 300, subdivision (b) states, in relevant part, that a child is within the jurisdiction of the juvenile court when “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child . . . due to the parent’s . . . substance abuse.” Under the statute, the juvenile court is not required to find that the child was in fact harmed, but only that the child is at “substantial risk of” harm.

In the present case, mother admitted to using methamphetamine at least twice during her pregnancy with the minor, once during her early pregnancy and again during her later pregnancy. Although she later denied her admission, the juvenile court disbelieved her denials. The record disclosed mother had an eight-year drug history. She had received voluntary services from the Department previously in 2005, and, when she failed to comply and gave birth to a drug-exposed child, the Department initiated dependency proceedings for all of the minor’s older siblings. During those proceedings, the juvenile court denied mother reunification services for the older siblings because

⁵ Because the purpose of a dependency proceeding is to protect the child rather than prosecute the parent, a minor may be found a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. (*James C.*, *supra*, 104 Cal.App.4th at p. 482.) As the Department points out, mother does not contest the juvenile court’s exercise of jurisdiction based upon the allegation relating to father, and this Court would be justified in affirming the juvenile court’s jurisdictional findings regardless of whether the count relating to mother is supported by substantial evidence. Relying primarily on our prior opinion in *In re Gladys L.* (2006) 141 Cal.App.4th 845, mother asserts in her opening brief that any finding as to her unfitness is not harmless as it is “the first step[] on a path which could lead to the termination of parental rights.” The present case does not present the same factual situation as *Gladys L.*, a case in which the Department never filed a petition alleging the absent father violated any provision of the Welfare and Institutions Code nor alleged potential detriment to the child from the father’s conduct other than his prior absence from her life. (*Id.* at p. 848.) As we discuss below, mother is not in the same position as the father in *Gladys L.*, who was nonoffending.

mother's whereabouts were unknown. Further, mother had no contact with the siblings for the duration of their dependency case.

In the present dependency proceeding, even if both mother and the minor tested negative at the time of the minor's birth, mother admitted to methamphetamine use during her pregnancy with the minor. When police officers pulled her over in September 2008, when she was pregnant with the minor, she appeared to the officers to be under the influence. She then failed the field tests that the officers administered, providing corroboration for her admission that she used during pregnancy. Mother's failure to test after the minor's detention and her single test for alcohol, not drugs, further suggested mother was a current user of methamphetamine or some other illicit drug. Such evidence, in combination with mother's history as to her four older children, constituted substantial evidence for the exercise of the court's jurisdiction. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 899-900 (*Troy D.*) ["prenatal use of dangerous drugs by a mother is probative of future child neglect," and court "is not required to disregard mother's prior conduct"].)

The foregoing elements weighed heavily with the juvenile court. The court noted mother's drug history and cited information that she had used during "the last nine month period." The court also took into consideration mother's denials but found them not credible. Mother's history, coupled with mother's failure to test, persuaded the court the minor was at present risk of harm from mother's conduct. The court properly took such matters into consideration. "[P]ast events can aid in a determination of present unfitness." (*Troy D.*, *supra*, 215 Cal.App.3d at p. 900, quoting *In re Melissa H.* (1974) 38 Cal.App.3d 173, 175.) The court, as arbiter of fact, concluded the child was presently at risk, stating, "Whenever somebody has a history of drug use and they don't make their testing, the court is always concerned because it's that they're trying to prevent a positive test." Indeed, the court commented, "I don't know what mother is a current user of because mother hasn't tested for drugs. And that's part of the problem." A parent's past neglectful conduct and evidence of lack of reformation is sufficient evidence to support

jurisdiction under section 300, subdivision (b). (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1439-1440.)

2. *The Court Properly Removed the Child from Parental Custody*

Once the juvenile court finds a child to be within its jurisdiction under section 300, it must conduct a disposition hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) If the court declares the minor a dependent, it then considers whether the child may remain with or must be removed from the parents. To remove a child from the parents' custody, there must be clear and convincing evidence that removal is the only way to protect the child. (*Ibid.*) When a parent challenges the dispositional finding that results in the removal of the child from the parent's custody, the question is whether that finding is supported by substantial evidence. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078.) Even though the juvenile court's findings are based upon the heightened standard of clear and convincing evidence, the substantial evidence test remains the standard of review on appeal. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694-695.) In such review for substantial evidence, we draw all reasonable inferences to support the findings and recognize that issues of credibility are matters for the juvenile court. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75; *In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

"The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citation.]" (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The court may consider a parent's past conduct as well as current circumstances. (*Troy D., supra*, 215 Cal.App.3d at p. 900.) Evidence of past conduct is probative of present conditions, especially when there is reason to believe that the conduct will continue in the future. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

The same substantial evidence justifying the juvenile court's assertion of jurisdiction, related above, supports the juvenile court's removal order. Mother's conduct during her pregnancy, her single test for alcohol not drugs, and her refusal to comply with

her plan for on-demand drug testing provided substantial evidence to support removal of the minor. There was no showing mother had an ability to remain sober from drugs or to protect her child from drug exposure. In light of the entire record, the court could properly conclude removal was the only reasonable alternative and that reasonable efforts were made to prevent or eliminate removal of the minor from her parents' home.

DISPOSITION

The orders are affirmed.

FLIER, J.

We concur:

RUBIN, ACTING P. J.

BIGELOW, J.